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The Main Issues After the Convention on the Constitutional Treaty for Europe

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Abstract

It will ultimately be necessary for the European Union ("EU") to stop simultaneously handling economic issues by the Community method and foreign policy measures by an undemocratic intergovernmental method. When the time comes for a single method to be chosen, it is important for the long-term stability of the Union and for the small Member States, that the Commission and the Community method in operation be suitable. Unfortunately, the result of the proposed Constitution devalues it.

THE MAIN ISSUES AFTER THE CONVENTION ON THE CONSTITUTIONAL TREATY FOR EUROPE

*John Temple Lang**

*"For most important things, success actually requires avoiding many separate causes of failure."*¹

*"The object of our inquiry is, Is the power necessary, and is it guarded?"*²

*"The failure of British politicians is their inability to recognise that the nightmare Germany's leaders wish to avoid is the 19th century balance-of-power politics that British deem normal."*³

*"A long time, and much prudence, will be necessary to reproduce a spirit of union and reverence for government."*⁴

SUMMARY

The Convention has reached a consensus on a number of principles for the new Constitutional Treaty for Europe. Nevertheless, the next InterGovernmental Conference ("IGC") will be faced with important and controversial issues concerning the size of the Commission. The proposal to reduce the number of voting Commissions to fifteen would mean that at any one time, two-fifths or more of the Member States would have no nominee acting as a full voting Member of the Commission, thus preventing those Member States from having full confidence in the Commission. This would devalue the "Community method," which depends on a fully representative and independent Commission consisting of nominees of all Member States. This is particularly important because the scope of majority voting and co-decision with Parliament has already been widened, and is likely

* Cleary, Gottlieb, Steen & Hamilton, Brussels; Professor, Trinity College, Dublin; Senior Visiting Research Fellow, Oxford. I am grateful to Eamonn Gallagher for many valuable comments on this Article. This Article is based on the text of the Draft Treaty Establishing a Constitution for Europe.

1. JARED DIAMOND, GUNS, GERMS AND STEEL 157 (1997)

2. John Marshall, Address at the Virginia Ratifying Convention, at http://www.constitution.org/rc/rat_va_08.htm (June 10, 1788).

3. *Germany's Europe*, FIN. TIMES, Apr. 28, 1994, at 25.

4. DAVID RAMSAY, THE LIFE OF GEORGE WASHINGTON (1807) (writing at the time of George Washington's inauguration).

to be widened further. The Commission's role as a mediator with the exclusive right to propose economic measures is essential to make majority voting acceptable.

Due to the Common Foreign and Security Policy's ("CFSP") intergovernmental status, the issues of a Council President and a Foreign Minister also concern variations on inter-governmentalism. The clauses on CFSP are open to two major criticisms. First, they largely exclude the Commission — its only power is to veto proposals made by the Minister for Foreign Affairs. As a result, there are no "checks and balances." Second, there is no democratic control of CFSP. The Minister merely "consults" the Parliament which is not responsible to CFSP. This is not the Community method.

It will ultimately be necessary for the European Union ("EU") to stop simultaneously handling economic issues by the Community method and foreign policy measures by an undemocratic intergovernmental method. When the time comes for a single method to be chosen, it is important for the long-term stability of the Union and for the small Member States, that the Commission and the Community method in operation be suitable. Unfortunately, the result of the proposed Constitution devalues it.

INTRODUCTION

Everyone understands the principle of separation of legislative, executive, and judicial powers, in a unitary State, and the broad distinction between central and regional powers in a federation is also well-known.

What is now called the "Community method" in European cooperation is less well understood. The Commission was invented for a purpose, but many people do not know what it is. It is somewhat complex, and it comes from mediation theory rather than political science, but it is clear. An independent and representative mediator institution makes balanced proposals which are designed to reconcile the interests of all the Member States. The mediator body decides nothing in relation to new policies — they are decided by the Council and Parliament. The mediator's role is to make majority voting acceptable to a minor-

ity which may be outvoted.⁵ This, the original basic conception of the Commission, requires it to propose new policies in the interests of the whole EU, safeguarding minority interests as much as possible. Because it does not itself adopt or approve

5. The reasons for inventing the Commission, and the way it works in practice, are explained more fully in JOHN TEMPLE LANG & EAMONN GALLAGHER, *THE ROLE OF THE COMMISSION AND QUALIFIED MAJORITY VOTING* (Institute of European Affairs, Occasional Paper No. 7 1995) [hereinafter *ROLE OF THE COMMISSION*]; John Temple Lang & Eamonn Gallagher, *What Sort of European Commission Does the European Union Need?*, 1 *EUROPÄRTSLIG TIDSKRIFT* 81 (2002); John Temple Lang, *How Much do the Smaller Member States Need the European Commission?*, 39 *COMMON MKT. L. REV.* 315 (2002); John Temple Lang, *Institutional Changes in the European Union to Prepare for Enlargement: Which Role for the Commission?* 2000-2 *ERA-FORUM* 2, 2-9 (2000); John Temple Lang, *Community Constitutional Law*, in *CONSTITUTION-BUILDING IN THE EUROPEAN UNION* 124, 217 (Brigid Laffan ed., 1996) [hereinafter *CONSTITUTION-BUILDING*]. Comments on some aspects of the Convention can be found in John Temple Lang, *The Commission: The Key to the Constitutional Treaty for Europe*, 26 *FORDHAM INT'L L.J.* 1598 (2003). See also Francois Lamoureux, *La Constitution "Pénélope" une Refondation Pour en Finir Avec les Replâtrages*, *REVUE DU DROIT DE L'UNION EUROPÉENNE*, Jan. 2003, at 13 (discussing the Draft Constitution which was used by the Convention as the basis of much of its drafting and correctly describing the "Community method" but omitting any reference to the sole right of initiative in describing the role of the Commission). See also Mattera, *Les Zones D'ombre du Projet de Constitution Dans l'Architecture Institutionnelle de l'Union est la Composition de la Commission*, *REVUE DU DROIT DE L'UNION EUROPÉENNE*, Jan. 2003, at 5-12 (assessing the Convention's proposals on the Commission as a "solution fâcheuse pour grands et petits").

The Convention's principal Article on the Commission (Article I-25(1)) specifically excludes it from the Common Foreign and Security Policy ("CFSP"):

The European Commission shall promote the general European interest and take appropriate initiatives to that end. It shall ensure the application of the Constitution, and steps taken by the Institutions under the Constitution. It shall oversee the application of Union law under the control of the Court of Justice. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Constitution. With the exception of the common foreign and security policy, and other cases provided for in the Constitution, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.

Draft Treaty Establishing a Constitution for Europe, July 18, 2003, art. I-25(1), O.J. C 169/1, at 13 (2003) (not yet ratified) [hereinafter *Draft Treaty*]. Article I-25(2) reads: "Except where the Constitution provides otherwise, Union legislative acts can be adopted only on the basis of a Commission proposal. Other acts are adopted on the basis of a Commission proposal where the Constitution so provides." *Id.* art. I-25(2), at 13.

Several draft treaties had been prepared before the Convention finished sitting. For the text of a treaty which the U.K. Government would have preferred, see Alan Dashwood et al., *Draft Constitutional Treaty of the European Union and Related Documents*, 28 *EUR. L. REV.* 3 (2003). For the U.K. Government's view after the Convention, see *THE BRITISH APPROACH TO THE EUROPEAN UNION INTERGOVERNMENTAL CONFERENCE 2003* (White Paper, Sept. 2003).

new policies, its composition need not be in proportion to the population of the EU. It is a think-tank, not a representative body. The Community method is based on a Commission equally independent of all the Member States and on which each State has a nominee at all times. Clearly, the Community method is more beneficial for small Member States, which need institutional safeguards, than intergovernmentalism without institutional safeguards, or the confused provisions of the Treaty of Nice. The Commission is the only safeguard for minority interests in all cases in which majority voting is allowed.

The intergovernmental method is also clear. In principle, all States have to agree, but small States can be bought off or put under pressure. No third approach to international cooperation has been suggested. The Community method and intergovernmentalism are mutually incompatible and while they cannot be mixed, they can be used in different spheres if a satisfactory frontier can be drawn between them.

The intergovernmental method comes in several versions. If unanimity is required, even a small State has a veto, but it may not be wise to exercise it often. Another version does not require unanimity, and a dissenting State is not bound by the decision of the majority, but may be inconvenienced by its consequences. The least attractive version of the intergovernmental approach is majority decisions *not* based on proposals made by an independent representative mediator institution.

A less clear version of intergovernmentalism can arise indirectly. It arises in each of the new offices or institutions which have been suggested by Member States in the Convention. Two new offices, the "President of the Council" and the "Foreign Minister" would, in practice, act on the instructions of a majority of the governments in the Council, without the safeguard that would come from directives proposed by the Commission as an impartial mediator. Each of these proposals would bypass the Commission and the Community method, and they are presumably designed to do so. If the Community method is not used, decisions will be taken by some kind of majority, probably in practice by the delegates of the six large Member States (seven, when Turkey joins).

Supporters of the intergovernmental approach even go so far as to suggest that the Commission should be responsible to

the Council as well as the European Parliament, although the independence of the Commission is now guaranteed precisely by the fact that it is appointed by the Council and removable only by the Parliament. It is no coincidence that these three new suggestions have all been made by large Member States.

It is now necessary to look at the result of the Convention as objectively as possible, not comparing it with the previous Treaties (in some respects it is clearly an improvement), or with some of the undesirable suggestions made during the Convention, or with the unsatisfactory Treaty of Nice, but on its merits, concentrating on the most important issues. The undoubted fact that the Convention proposal is better than the Treaty of Nice should not conceal its disadvantages or cause it to be accepted uncritically. The question is not whether a more satisfactory treaty could have been obtained at this time, but whether it is a satisfactory treaty in the long term. To assess it objectively, it must be viewed as a kind of constitution, not merely as a treaty.

I. *THE CONVENTION'S ACHIEVEMENTS*

The Convention has not agreed on a complete new treaty. The intention is that a small number of important issues will be decided by an InterGovernmental Conference. At or before that conference, alliances and agreements can be made between the large Member States, and pressure can, if necessary, be put on the smaller ones. The new treaty will not now be signed anyway until after the accession of the new Member States in May 2004.

In order to put the remaining issues facing the IGC in context, it is necessary to outline the issues on which the Convention has substantially agreed.

In French legal theory, a distinction is made between a "framework treaty" [*traité-cadre*] and a "treaty law" [*traité loi*] which sets out substantive rights and duties. This paper is concerned with the parts of the new treaty which concern the future institutions, not with the objectives and policies of the Union. The institutional provisions are likely in the long term to be more important than the proposed policy clauses, but in any case, in the next year or so they will be more controversial and more widely discussed.

The disadvantages of intergovernmentalism do not affect the majority of the Convention's achievements. The Convention

has substantially agreed on a series of important points to be included in the proposed new Constitutional Treaty. The most important points are:⁶

1. The Treaty will say that powers in certain areas and for certain purposes are attributed to the EU, subject to the principles of subsidiarity and proportionality. National parliaments will be able to intervene politically if they believe that a proposal is contrary to the subsidiarity principle, and if it is adopted it can be challenged in the Court of Justice. The principle that Member States must cooperate in good faith to pursue the EU objectives, which is already in the existing Treaties, will be confirmed and extended.⁷
2. The EU will be one legal entity, under a single, relatively simple, new Constitutional Treaty, which will replace the existing Treaties.
3. The new Treaty will include the Charter of Fundamental Rights and a legal basis for future accession to the European Convention on Fundamental Rights.
4. The new treaty will contain various constitution-style provisions on exclusive and concurrent powers, and on categories of EU measures.
5. There will be power to adopt other measures not expressly foreseen but which may be considered necessary in the future, if the Council is unanimous and the European Parliament agrees. This, now referred to as "flexibility," and now in Article 17 of the Draft Treaty, already exists in Article 308 of the EC Treaty.⁸

6. See MICHAEL DOUGAN, THE FEDERAL TRUST FOR EDUCATION AND RESEARCH, THE CONVENTION'S DRAFT CONSTITUTIONAL TREATY: A 'TIDYING-UP EXERCISE' THAT NEEDS SOME TIDYING UP OF ITS OWN (2003); see also PAUL CRAIG, THE FEDERAL TRUST FOR EDUCATION AND RESEARCH, WHAT CONSTITUTION DOES EUROPE NEED? THE HOUSE THAT GISCARD BUILT: CONSTITUTIONAL ROOMS WITH A VIEW (2003).

7. For a discussion on Articles 5 and 10, see FÉDÉRATION INTERNATIONALE POUR LE DROIT EUROPÉEN, *General Report: The Duties of Cooperation of National Authorities and Courts and the Community Institutions under Article 10 EC Treaty*, in 1 XIX FIDE CONGRESS 373-426 (2000) [hereinafter XIX FIDE CONGRESS]; 4 XIX FIDE CONGRESS 65-72; John Temple Lang, *The Duties of Cooperation on National Authorities and Courts Under Article 10 EC: Two More Reflections*, 26 EUR. L. REV. 84, 84-93 (2001).

8. See Consolidated version of the Treaty establishing the European Community, art. 308, O.J. C 325/33, at 153 (2002), 37 I.L.M. 79, at 140 (ex Article 235) [hereinafter Consolidated EC Treaty], incorporating changes made by Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Feb. 26, 2001, O.J. C 80/1 (2001) [hereinafter Treaty of Nice]

6. There will be important provisions on economic cooperation.
7. It is accepted that the scope of qualified majority voting will be extended, replacing unanimity in some important areas, yet to be agreed. All measures which can be subject to majority voting in the Council will need the consent of the Parliament in the co-decision procedure — an important pro-democracy step.
8. It is suggested, but *not* agreed, that a qualified majority will be a simple majority of States, having, e.g., sixty percent of the population of the EU — a simple and intelligible rule, but one which gives much greater weight to, e.g., Germany (population 80 million) than to Spain (population 40 million) and the smaller Member States, than is given under the Nice Treaty voting formula.
9. There will be provisions on developing a common foreign and security policy.⁹
10. Future Treaty changes will be subject to co-decision by the Parliament.
11. The Euro currency zone will be given constitutional status.

Although the present three “Pillars” will be formally abolished, foreign policy and most justice measures will *not* be adopted with the safeguards provided by the Community method. It will therefore be important to see how far measures not subject to the Community method will continue to be, as they are at present, subject to unanimity.

II. *THE MAIN ISSUES FOR THE IGC CONFERENCE*

The principal issues that the IGC — in which the new Member States will take part — needs to resolve are:

1. The number of Commissioners, and their appointment and removal from office;

(amending Treaty on European Union (“TEU”), Treaty establishing the European Community (“EC Treaty”), Treaty establishing the European Coal and Steel Community (“ECSC Treaty”), and Treaty establishing the European Atomic Energy Community (“Euratom Treaty”) and renumbering articles of TEU and EC Treaty).

9. See generally SIMON DUKE, EUROPEAN INSTITUTE OF PUBLIC ADMINISTRATION, THE CONVENTION, THE DRAFT CONSTITUTION AND EXTERNAL RELATIONS: EFFECTS AND IMPLICATIONS FOR THE EU AND ITS INTERNATIONAL ROLE (Working Paper No. 2003/W/2, 2003).

2. The election and powers of the President of the Commission;
3. The proposal for a long-term President of the Council;
4. The proposal for an EU "Foreign Minister";
5. The areas to be made subject to qualified majority voting and co-decision, instead of unanimity, as at present;
6. The weighting of votes in the Council and the "double majority" (a majority of Member States, and a majority of the population of the EU).

The last two issues are not discussed in this paper.¹⁰

A. *The Size of the Commission*

There are now essentially two views regarding the size of the Commission:

1. The Commission should be composed of one nominee from each Member State, irrespective of the number of Member States. This is essential for the Commission's policy-proposing tasks, and for its law-enforcing role, for the foreseeable future. It is essential that all Member States have full confidence in the Commission at all times.¹¹ The

10. See RICHARD BALDWIN & MIKA WIDGREN, CENTRE FOR EUROPEAN POLICY STUDIES, *DECISION-MAKING AND THE CONSTITUTIONAL TREATY: WILL THE IGC DISCARD GISCARD?* (2003). Baldwin and Widgren discuss the importance of the Commission's role in setting the agenda (but not for CFSP), and argue that the Commission's power is indirectly increased under the Constitutional Treaty because the double majority rule for voting makes it easier for the Council to adopt measures than under the Nice Treaty formula. Baldwin and Widgren also argue that the Commission's role becomes more important when the Member States are more heterogeneous because they are less likely to all think the same way. *Id.* at 12. The authors conclude that non-voting Commissioners would reduce the Commission's legitimacy. *Id.* at 18.

11. Jacques Delors, former President of the European Commission, has said: Experience shows that, for the large majority of countries, the European Commissioner is the person who reassures, who guarantees that the situation of his or her country of origin is taken into consideration in Brussels and conversely is the person who can explain to the government of his nationality all the ins and outs of each dossier.

Agence Europe, Apr. 29, 2003, at 3. The Commission apparently now believes that there should be one Commissioner per Member State. But before Nice Commissioners took the view that the status quo was not an option and that the small States had to accept both "senior" and "junior" Commissioners or rotation of nominees. The entire discussion since before Nice has been confused because the Commission did not have a consistent position and did not seem to understand clearly what is its *raison d'être*. See generally TEMPLE LANG & GALLAGHER, *ROLE OF THE COMMISSION*, *supra* note 6; JOHN TEMPLE LANG, ACTION CENTRE FOR EUROPE, *THE ROLE OF THE COMMISSION AND THE EURO-*

traditional view is that all Commissioners should have equal votes.

2. A Commission of more than fifteen members is too large to be efficient. If small States insist on being able to nominate a Commissioner, half of the States should nominate voting members of the Commission for five years, and the other half should nominate non-voting Commissioners. Commissioners' portfolios would not all be equally important if there were twenty-eight or thirty Commissioners. This formula emerged, for the first time, at the end of the Convention.

Therefore, the key issue is whether the Commission should be a small, efficient, but not representative body, or a larger but clearly representative body.¹²

B. Has the role of the Commission changed?

One of the reasons for the assumption that a smaller Commission would be preferable is that it is assumed that the Commission's policy-proposing role is no longer important since the EU no longer needs to develop new policies (and that the Commission should not be involved in developing new policies within the spheres of foreign policy and justice). These assumptions suggest that the law-enforcing, quasi-judicial tasks of the Commission and its responsibilities for handling the EU budget (which are, inaccurately, referred to as "executive" tasks) are now its only tasks, and that a smaller Commission would perform them more efficiently.

This current view has formed for several reasons:

1. There has been genuine and widespread ignorance about why the Commission was invented.
2. There has been a deliberate effort, especially in the United Kingdom, to downplay the Commission's role by describing it as a civil service, a secretariat, or an "executive" which merely ought to be carrying out the instructions of the Parliament or the Council.

PEAN PARLIAMENT (2000); JOHN TEMPLE LANG, *EUROPAEUM, THE COMMISSION AND THE EUROPEAN PARLIAMENT AFTER NICE* (2001) [hereinafter TEMPLE LANG, *EUROPAEM*]; John Temple Lang, *How Much do the Smaller Member States Need the European Commission?*, 39 COMMON MKT. L. REV. 315 (2002).

12. Commissioners are not "representatives" of the countries which nominated them, but collectively represent the Union as a whole.

3. The Commission's policy-proposing, law enforcing and managerial functions, considered separately, would ideally require three different institutional arrangements. Its policy-proposing tasks should be performed by a group composed of one nominee policy-maker from each Member State. Its law enforcement tasks should be performed by a group of lawyers and economists; but just as it is accepted that the Court of Justice should consist of one judge from each Member State, it should be accepted that there ought to be one Commissioner from each State for law enforcement tasks. For budget and other managerial functions, however, it is said that a smaller Commission would be more efficient. This assumes that a smaller Commission, with nominees from only half of the Member States at any time, would generally be regarded as an impartial body. This is a crucial assumption, and it is one that is most unlikely to be correct.
4. There is a view that the Commission no longer needs to propose new economic policies. This view assumes that because the Single Market and the EU's other policies have been completed, the EU will not need to develop any new policies for any purpose either within the EU or in its relations with the rest of the world. It is self-evident that this view is incorrect. While a start has been made on most of the policies which the EU should have, many of them still are incomplete, and almost all of them need to be kept up-to-date and adapted to changing circumstances. With ten new Member States and more to come, and with rapid changes in the world economy foreseeable, revised policy proposals (rather than completely new policies) will certainly be needed. In addition, the EU will continue to need an impartial governmental body to handle international economic negotiations on its behalf.
5. It is also taken for granted that the Commission should continue to maintain all of its existing responsibilities.

It is assumed that the Commission should *not* have a significant policy-proposing role in developing the EU's future common foreign and security policy. This is because several of the large Member States believe that they are better qualified to control this policy themselves.

III. *THE COMMISSION: THE CONVENTION PROPOSAL*

The proposal¹³ is that each Commission should be appointed for five years, and that, from 2009 on, during each five-year period only fifteen "European" Commissioners would have votes, including the Commission President and the Minister for Foreign Affairs. Member States' nominees would rotate on the basis of equality between Member States. With twenty-five Member States, this means that each State would have a nominee with voting rights for ten out of every fifteen years. Since there will be more States when the new regime comes into force (Bulgaria, Romania and probably Croatia and Turkey will have joined by then), the proportion of time during which each State would have a voting nominee would be less than that, even by 2009.

The proposal is a compromise between the large States' wish to have ten to fifteen Commissioners and the smaller Member States' interest in having a Commission on which every State would have a nominee with voting rights at all times.

The large Member States argue that a Commission of more than fifteen voting members would be too large, that Commissioners are not there to represent the interests of the States nominating them (so that there does not need to be one from each State), and that it is wrong to treat Luxembourg (population 400,000) in the same way as Germany (population 80 million) in this respect.

A. Issues raised by the Convention's formula on the Commission

The Convention's proposals concerning the Commission raise several questions:

1. Is it satisfactory to have a Commission with nominees of only fifteen Member States as voting Commissioners?
2. Would having fifteen non-voting members be an improvement?
3. Is it possible to have fifteen voting members who "reflect satisfactorily the demographic and geographical range of all the Member States"?¹⁴
4. Are the powers of selection and removal,¹⁵ given to the

13. See Draft Treaty, *supra* note 1, art. I-25, O.J. C 169/1, at 13-14 (2003).

14. See *id.*

15. *Id.*

President of the Commission, excessive?

5. What is the status of the President and the Minister within the Commission?

1. The Convention's Formula on the Commission

The Protocol on Enlargement in the Nice Treaty said that when the number of Member States reaches twenty-seven, the number of Commissioners shall be less than the number of Member States.¹⁶ The number was not specified, but the Commissioners would be chosen "according to a rotation system based on the principle of equality"¹⁷ between States, and each Commission shall "reflect satisfactorily the demographic and geographical range of all the Member States."¹⁸ Article 25 of the Draft Treaty repeats essentially the same phrases.

The number of voting Commissioners now envisaged by the Convention is fifteen. No suggestions have yet been made, and no mechanism or formula has been mentioned, to say *how* a Commission of fifteen voting Commissioners could "reflect satisfactorily" twenty-five or more very diverse Member States. Presumably, the President and Foreign Minister would be treated as nominees of the States from which they came.¹⁹

For purposes of illustration, assume a twenty-five member Commission with fifteen voting members. This would mean that at any one time, three-fifths of the States would have voting nominee Commissioners. In the first Commission, three groups of five States each would all have voting nominees. In the second Commission, one of these groups, and the two other groups of five States, would all have voting nominees. In the third Commission, three of the four groups which had previously had voting nominees in only one period would again have voting nominees. When the fourth Commission would be set up, there would be one group of States that would have had voting nomi-

16. See Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Protocol A, art. 4(2), O.J. C 80/1, at 52 (2001).

17. *Id.*

18. *Id.* Protocol A, art. 4(3)(b), O.J. C 80/1, at 52 (2001).

19. If they were not treated in this way there would have to be rules to ensure that there were no other voting Commissioners of the same nationality at the same time, and the periods during which States would have no voting nominee would be longer than envisaged in the text.

nees in only one of the three previous periods. That group, and two of the other groups, would have voting nominees in the fourth Commission. As soon as any more Member States joined, the rota would have to be reorganized, and the periods during which each State would have no voting nominee would be longer.

The composition of each Commission would also be subject to the Draft Treaty's requirement that each Commission be composed in such a way that every one of the combinations would "reflect satisfactorily the demographic and geographical range of all the Member States."²⁰

It is not mathematically possible to always have voting nominees of three large Member States as members of the Commission. The inextricable complexity of the five combinations of twenty-five States should not be allowed to conceal the impossibility of the objective called for by the Nice and Convention clauses just quoted. It seems clear that the complexities and difficulties of the Convention's formula were not seen or understood. In the Convention, as in Nice, an inadequately considered, simple-sounding, formula was adopted. It is obviously impossible to explain this clearly to the electorates.

2. Criticisms of the Convention's Formula

It may be said that it does not matter if the voting Commissioners do not "reflect satisfactorily" the diversity of the twenty-five Member States, because there will be ten or more non-voting Commissioners as well. This argument is wrong, for at least two reasons. First, the Convention text rightly requires the voting Commissioners to reflect the EU, and correctly, if cynically, disregards the non-voting "Commissioners." Second, only the voting Commissioners matter. A State which believes that its interests have been disregarded by a Commission proposal or a Commission decision will not be satisfied by being told that it will have a voting nominee in five years' time, even if that were true.

The first and most basic objection to the Convention formula is that it misses the point. The issue is not whether the States are treated equally, but whether the formula causes the Commission to be (or to be regarded as) an unsatisfactory medi-

20. Draft Treaty, *supra* note 1, art. I-25(3)(b), O.J. C 169/1, at 14 (2003).

ator. If it does, then it would not matter that the States were all treated equally, even if that were true. Unfortunately it is clear that the Convention formula would prevent the Commission from fulfilling its role satisfactorily. A Commission on which two-fifths or more of the Member States have no voting nominees is not an impartial mediator, representative of the whole EU, and equally independent of all the Member States. The fact that the formula has been accepted suggests either that it was not carefully considered, or that those who accepted it did not understand the Commission's role in the Community method, or did not think it important that the Commission would be unsatisfactory. All three explanations are probably correct.

The Commission does not merely initiate or propose policies. It also acts as a facilitator and mediator between Member States when they disagree, and between the Council and the Parliament when their views need to be reconciled, as they do increasingly often in co-decision procedures. The Commission's roles in these respects are essential to make the EU work smoothly, and indeed to make it work at all. These tasks will be more necessary than ever in the future with twenty-five or more Member States. For these continuing roles the Commission must be, and must be seen clearly to be, indisputably objective and impartial in a way that a Commission composed of only fifteen voting members could not be.²¹

In addition:

- It is hard to imagine any large State accepting that the Commission could possibly "reflect satisfactorily the demographic . . . range of all the Member States" if its nominee had no vote.
- When the UK and either France or Germany (or any three large States) are without voting nominees, it is impossible to imagine that they will accept that the Commission "reflects" them, adequately or at all.
- It is hard to imagine that Ireland, for example, would feel "reflected" by a UK voting nominee, and if it did, that the UK would reciprocate.

Whatever compromises might ultimately be devised, it is obviously impossible to design any Commission of fifteen members which would "reflect satisfactorily" an EU of twenty-five or more

21. See *ROLE OF THE COMMISSION*, *supra* note 5, at 21-25.

very different States. This would mean that at any one time, the Commission would lack the confidence of at least two-fifths of the Member States. In the long term, this means that the Commission, and therefore the Community method, will be considered unsatisfactory.

The second, simpler and fundamental, objection to both the Nice Protocol and the Convention formula is "based on the principle of equality." It is naïve and unrealistic, however, to believe that a small Member State without a nominee is "equal," in any meaningful sense, to a large Member State without a nominee. Much has been made of the fact that the six most populous States (with over 40 million inhabitants each) represent seventy-four percent of the EU population. Three large States representing thirty-five to forty percent of the population²² cannot be expected to accept that a Commission excluding their nominees "reflects" the demographic range of all the States. Further, the large Member States will ensure other ways for their interests to be taken into account at all times while smaller States will be unable to do this.

The argument of "legal equality" of States is a naïve self-deception, serving as a comfort blanket for small States which refuse to see the harm done to the Community method and their own interests by the Nice Treaty formula and the Convention formula. Indeed this single mistake seems to explain the surprisingly widespread failure of some of the small States to understand the significance and ill-effects of the proposal. This self-deception, however, is unlikely to last.

In all Member States with referenda on the new Constitutional Treaty, popular support may depend on whether the States have recovered their right to nominate a Commissioner at all times. Non-voting "Commissioners" who have neither portfo-

22. Mr. Giscard d'Estaing repeatedly pointed out that Germany has a larger population than California, and that Luxembourg and Malta have populations smaller than Rhode Island. In Europe, apart from the six large States with seventy-four percent of the population, there are eight States (Netherlands, Greece, Portugal, Belgium, Sweden, Austria, the Czech Republic, and Hungary) having populations of between 8 million and 16 million, forming together nineteen percent of the total, and eleven smaller States (Denmark, Finland, Ireland, Luxembourg, Lithuania, Latvia, Estonia, Slovenia, Slovakia, Cyprus, and Malta) which only represent seven percent of the population. But the Convention proposal means, among other odd results, that the three Baltic States (8 million inhabitants) will always have one voting nominee in the Commission, while the 80 million Germans will not.

lios nor clearly established roles, and who have no right to be involved in all of the Commission's work, clearly are not substitutes for voting Commissioners.

The proposal is open to a number of specific criticisms:

- The non-voting Commissioner position is a mere gesture to the smaller Member States. (It is so obviously unsatisfactory that one suspects they are expected to reject it). It will be difficult to recruit high-quality candidates for the non-voting posts, since their roles are so unclear. They cannot rely on being appointed as voting Commissioners after five years, since the State nominating them might have a different government then, or might prefer to nominate a stronger candidate who was not originally interested in the non-voting position. The quality of non-voting Commissioners will probably be lower than that of the average Commissioner at present. Even if the non-voting members could explain EU affairs to national parliaments in different Member States and gather information on behalf of the Commission, the difficulty is that the non-voting members would be explaining policies on which they had not voted, about which they might not be fully informed, and with which they might not agree. Moreover, there are better ways of gathering information. Also, because non-voting members will not have participated in the discussions, the degree of solidarity between non-voting and voting Commissioners will be lessened. Their interlocutors will know that non-voting members are second-level Commissioners.
- Voting Commissioners will be unlikely to remain for a second five-year period as non-voting members. For this reason, the continuity, as well as the solidarity, of the Commission would be reduced.
- Without portfolios or the ability to vote, the function of the non-voting Commissioners will be reduced to defending the interests of the State that nominated them.
- Indeed, it is not clear what non-voting "Commissioners" will do, since they will have neither portfolios nor votes. The Commission will be reduced in size to make it more streamlined and efficient, and the more the non-voting members try to do the work of full Commissioners, the more that purpose will be defeated. Commissioners with portfolios and votes, appointed to form a small team, will have no reason to share their work with individuals who have neither. It is not even clear if they would have their own staff and, if so,

what that staff would do. In practice, non-voting "Commissioners" are likely to spend a lot of time listening to lobbyists. There would be a continuing struggle between the non-voting "Commissioners" trying to obtain influence, and the voting Commissioners trying to keep the Commission small and streamlined.

- The proposal is also open to the criticism that each voting Commissioner will be expected in some way to safeguard the interests of one or more of the States without voting nominees, while all Commissioners should be acting only in the general interest.
- The proposal would give States, in particular large Member States, an excuse to object to Commission proposals and decisions (e.g., on State aids)²³ which they dislike on the grounds that they had been adopted by a Commission on which the nominee of the State in question had no vote. They would be particularly reluctant to accept a Commission proposal if their non-voting nominees were known to have disagreed with it, or if their nominees were not regarded as particularly influential or effective.
- The objection that the Convention formula in fact gives more weight to the larger States is made more serious because the Convention also proposed a re-weighting of the votes in the Council. Until now, smaller States had votes out of proportion to their populations: the new Council "double majority" voting formula (sixty percent of the EU population and a majority of the States) gives much greater power to the larger States than ever before. As the scope of majority voting and co-decision by the Parliament was widened by the Convention and seems likely to widen further in the IGC, the need for the safeguard provided by the Commission (which is needed precisely because of majority voting) becomes even greater.
- The objection to the Convention formula is *only* to the concept of non-voting "Commissioners." "Senior" and "junior" Commissioners, in the sense that some would have broader or more important responsibilities within the Commission, could not be objected to. In effect, that exists informally already.
- In other words, the proposal involves *both* the disadvantages of "senior" and "junior" Commissioners and the disadvan-

23. In 2001, State aids in the fifteen Member States amounted to 86 billion euro, almost as much as the EU budget. The importance of effective control by the Commission of this flow of money is self-evident.

tages of rotation of a reduced number of Commissioners between the Member States.

All this has at least three other consequences. First, it lowers the status of the Commission, because at any time two-fifths of the Member States will not have as much confidence in the Commission as if their nominees had votes. Second, it reduces the safeguard for the smaller Member States which has so far been provided by a Commission composed of one voting Commissioner from each State.

This is not surprising. The Commission was the only institution which the large Member States wished to reduce in size. They did not propose reducing the number of judges in the Community Courts or the Members of the Court of Auditors, below the number of Member States. The Commission was the institution whose authority they wished to weaken. The U.K. was frank about this, and the fact that this was the French objective also became very clear. The argument that large Member States ought to have voting nominees in the Commission at all times showed that the large States did not want to agree to even formal equality of States on paper in this respect.

This proposal is an unfortunate example of what the Convention was intended to avoid: an ill-considered, illogical compromise instead of a rational legal construction. Nobody setting out to write a Constitution would have devised such a complex, unsatisfactory, and clumsy arrangement. This was partly due to the fact that the institutional issues were the only ones which were *not* carefully prepared and considered by a working group within the Convention.²⁴

The third, and less obvious, disadvantage of the Convention proposal is that it will make it harder to find a suitable President of the Commission. Unless the individual concerned remained

24. Apparently the Convention did not ask for a working group on institutional questions, but that did not prevent the Praesidium from setting one up. Because the Commission was never united on consistent and clear policy on its own composition and appointment, the natural majority in the Praesidium in favour of the Commission gradually broke up, and Mr. Dehaene in particular came to control what the Commission proposed. See KIRSTY HUGHES, *A DYNAMIC AND DEMOCRATIC EU OR MUDDLING THROUGH AGAIN? ASSESSING THE EU'S DRAFT CONSTITUTION* (European Policy Institute Network, Working Paper No. 8, 2003), available at <http://www.ceps.be> (rightly criticizing the inadequacy of the institutional debate in the Convention, and describing non-voting Commissioners as "an unhappy compromise," and the overall institutional compromise as "a recipe for on-going turf-fighting and confusion"). *Id.* at 6, 13.

on the Commission for fifteen years, potential Presidents would be chosen only from those whose States had the right to nominate two voting Commissioners in succession. A potential President would be unlikely to accept a non-voting position even in his or her first term, and it would be better to appoint as President someone who had previously been a Commissioner, although this is not always understood.

A longer-term but even more serious consequence of the unrepresentative nature of the Commission as envisaged by the Convention is that the Commission's sole right to propose measures (which is essential to make majority voting acceptable) is likely to be put into question. Parliament itself is a threat to the Community method. Why should a plainly unrepresentative body have the sole right of initiative, when the Parliament has not? The answer (i.e., that the Commission safeguards the interests of minorities, which the Parliament cannot do) seems to have been forgotten (and would be less true of an unrepresentative Commission). The lip service paid by the Convention to the Community method will not recall it.

3. The Convention Formula on the Commission: Consequences on the Next Enlargement

It is unlikely that the next enlargement of the EU will involve five new Member States. Instead, it is likely to involve only Bulgaria, Romania²⁵, and perhaps Turkey. At that point it will be necessary to decide which Member States will be the first to lose their right to nominate a voting Commissioner, out of order. Already the Convention formula leads to ten Member States being the first to lose their voting nominees in the first five-year period. After each future enlargement, several more States will lose their right to nominate a voting Commissioner in each alternate period, and relative equality between States cannot be restored until there are thirty States (and this equality will be lost again, if and when there are more than thirty).

A formula which necessarily and repeatedly gives rise to inequality and jockeying for position is profoundly unsatisfactory. This illustrates in another way why the formula "rotation on the

25. See Declaration attached to the Protocol on the representation of citizens in the European Parliament and the weighting in the European Council and the Council of Ministers, July 18, 2003, O.J. C 169/99 (2003).

basis of strict equality between Member States" is naïve, ill-considered, and certain to lead to undignified and undesirable secret bargains instead of open and fair government.

Inevitably this kind of secret bargain will weaken the Commission, because it will involve the nomination arrangements in controversy which will exasperate, and be incomprehensible to, electorates.

IV. *THE COMMISSION: LONG-TERM IMPLICATIONS OF TWO POLICY-MAKING "METHODS"*

The reduction in the number of voting Commissioners, and the resulting (and presumably intended) reduction in the standing of the Commission which will result, has serious long-term implications. As already explained, a fully representative Commission equally independent of all the Member States is essential to the "Community method." For some years to come, the EU will take economic decisions according to the Community method, and foreign policy and security measures according to the intergovernmental method. The devaluation of the Commission necessarily devalues the Community method, and makes it less likely that, whenever the EU decides to make all kinds of decisions by one method, the Community method (or some variation of it) will be adopted.

This is extremely unfortunate. When the European Community was organized in the 1950s, the Community method was considered essential for several reasons. First, as already explained, it was necessary to make majority voting on important matters acceptable, both in principle and in practice. Second, it was necessary to have a fully representative and independent Commission in order to create an institutional structure in which large and small Member States could co-exist satisfactorily. That had never previously been possible, and is not now possible, on an intergovernmental basis. Devaluing the Commission and the Community method devalues the key feature which made the Community effective and which made it acceptable even to Member States which were outvoted. What the Convention has unfortunately agreed is likely to make the EU both ineffective (because States without voting nominees will be less likely to accept Commission proposals and decisions) and unacceptable (because States will be less likely to accept being outvoted in

relation to Commission proposals which they will consider were drawn up without adequate safeguards for their interests).

When the time ultimately comes for the EU to adopt a single method for taking all the kinds of decisions which it is authorized to take, it is important for the smaller Member States that the Commission and the Community method then in operation be suitable for adoption, and has not been devalued.

It may also be important for the large Member States. At that time there will be at least six, perhaps seven, large Member States, out of a total of some thirty or more States. Insofar as there is majority voting, it will be entirely possible for several large Member States to be outvoted. Even under the Convention's Draft Treaty, a minority of Member States could veto an EU measure only if they contain forty percent of the total EU population. If the EU population is 500 million, it would need States with a total population of 200 million to veto a measure. At present, Germany, France and the United Kingdom together have a total population of only 180 million. It is unlikely that a measure which is seriously unacceptable to those three States would be adopted by a majority vote. But it is possible and nothing in the Convention prevents it. There must be more majority voting in the future than there has been in the past. The large Member States may ultimately come to regard the Community method and the Commission more favorably than they do at present.

What is more likely is that one or even two of these three large States would find themselves in a minority which was not large enough to have a veto. That might have been the situation if the difference of opinion over the war in Iraq in 2003 had been put to a vote under majority voting rules.

Governments tend to believe that they know best, and that democratic discussion is time-consuming, unnecessary, and may be awkward. If governments have two methods of making decisions, one involving the Commission and the Parliament and the other involving neither, they will *always* be tempted to use the latter method if possible. The more important and controversial the problem, the greater will be this temptation.

Of course, in the foreseeable future, common foreign and security policy measures will be subject to unanimity. This has unfortunate consequences. A common foreign and security pol-

icy which is not based on the Community method is likely to be handicapped in at least three ways. First, unanimity will be necessary in many areas in which majority voting should be acceptable if the Community method was used. Second, it will be necessary, to reduce the inconvenience of unanimity, to allow States to abstain from voting and from involvement with measures and policies which they dislike. The result is likely to be that foreign and security policy measures, in the name of the Union, are essentially adopted by those of the larger Member States which agree. That may be as much as can be expected. But it is not a real common policy. That, if and when it becomes a practical possibility, would involve the Community method. Third, the intergovernmental method is not subject to democratic control, which tends to make foreign policy measures less acceptable.

So the downgrading of the Commission and the Community method has made it more difficult to have an effective common foreign and security policy. The unwillingness of the large Member States to give the Commission its normal role in foreign and security policy postpones and weakens such a policy. In this respect, intergovernmentalism is self-defeating. It is likely to create arrangements which are neither satisfactory nor permanent. Until the Community method is applied to common foreign and security policy, the EU, unlike any other organization, will have two distinct sets of institutions and procedures, one for foreign policy, the other for economic and social policy. This is not a rational structure, and the EU will never have a satisfactory or permanent structure until it is rationalized. It was never realistic for the Convention to envisage majority voting on common foreign and security issues. But it was reasonable to look forward to the day when it would be possible, and it will be possible only on the basis of the Community method. A more far-sighted body than the Convention would have strengthened the Commission and the Community method. If this had been done, the EU would have been made more acceptable in the short term and, in the long term, more effective as well. It is disappointing, but not surprising, that this has not been done. The Convention, a success in many respects, has failed very seriously in this one.

V. THE COMMISSION: THE ALTERNATIVES

It has been said that either Commissioners need not have

any relationship with the State which nominated them (so their nationality is irrelevant), or a relationship (however described) exists. If a relationship does exist, as the small States believe, then it is said to be unreasonable that the five smallest States (Slovenia, Estonia, Luxembourg, and the two Mediterranean islands, the total population of which is less than 5 million) should have the same number of nominees as the six largest States (total population over 300 million). (This disregards the fact that Commissioners are not representatives, but are there to make the Commission representative of the whole, diverse Union, and to give small States confidence in the Commission). This version of the argument suggests that the Commission should always include a nominee of each of the large Member States, but not necessarily a nominee of each of the smaller States. This is of course *not* the Convention formula, but one which openly favors the large Member States. The Nice Treaty and the Convention formulas favor the large Member States, but do so less openly.

The Convention proposal may be regarded as so unsatisfactory that the small Member States refuse to accept it. If that happens, the large Member States are likely to propose a Commission on which each of them would always have a nominee, and on which the small Member States would share, in some way, the right to nominate the other Commissioners. That would, of course, entirely give up even the formal equality between the Member States, and make the Commission less independent of some States than of others.

There are three other alternatives which would be better than the Convention proposal. The best, of course, is a Commission with the number of Commissioners equal to the number of Member States, all having votes. This is the only way which will ensure that the Commission is fully representative of the EU as a whole and is equally independent of all Member States. This solution is, however, opposed by the large Member States, ostensibly on the grounds that it would make the Commission unwieldy and inefficient, more probably on the ground that it would give the Commission too much authority. Unless the small States understand the reasons for the Community method more clearly than they apparently have done so far, they will not win this argument.

A second alternative would be to have two Commissioners nominated by each of the large Member States, as at present,

and one nominated by each of the smaller States, all Commissioners having votes.

A third alternative, which could be combined with one Commissioner per State, would be to have each Commissioner nominated by two or three Member States. This has several advantages:

- It would increase the independence of the Commissioners from the Member States nominating them.
- It would improve the quality of the Commissioners, because the nominees would have to be acceptable to several governments rather than only one. Nominations could no longer be merely rewards for less successful politicians. A mechanism for improving the quality of Commissioners would be better than exhortations.
- It would cause governments to compete by putting forward the nominees most attractive to other governments, rather than the candidates most convenient for domestic, perhaps party-political, reasons.
- Insofar as Commissioners in practice defend the interests of the States which nominate them, it is better for a Commissioner to have two or three States' interests to safeguard than only one.
- The Commission would therefore be restored to what it was intended to be, an institution with continuity representing the whole and acting only in the interests of the whole.
- If necessary, the size of the Commission could be adjusted.

Before Nice, the idea that Commissioners should each be nominated by two or more States was informally suggested. The objection then was that it would facilitate a move to a situation in which there would be less than one Commissioner per Member State. (The odd idea of non-voting "Commissioners" had not then been suggested). That situation is now envisaged by the Convention formula. Two-State or three-State nominations would certainly be better than non-voting "Commissioners."

A Commission, each member of which had to be nominated by two or three governments, could be appointed, in essence, in two ways. The EU could be divided into a series of groups of two or three States, on a lasting basis, and each group would decide on its nominee. Each large Member State would presumably be in a different group, and no doubt its nominees would be most often nominated by its group.

Alternatively, there would be no fixed groups, and each government would have to find a candidate acceptable to any one or two other governments. This would put all the Member States, in this respect, on an equal footing.

Each method would, of course, give rise to bargaining of various kinds. The groups, in the first method, would not be easy to choose, but the difficulty would not be insuperable. The scope for informal and secret bargaining under the second method might be excessive, and might lead to cynicism.

Such a system would provide the main advantage of the Convention formula — higher quality Commissioners — by a much more democratic process, which would avoid putting excessive power into the hands of the President of the Commission. But unless there were always as many Commissioners as there were States, it might lead to the large States always nominating a Commissioner, and not sharing the nominations with other States. That would be almost as unsatisfactory as non-voting “Commissioners.”

VI. *THE POWERS PROPOSED FOR THE PRESIDENT OF THE COMMISSION*

With very little explanation, the Convention suggested that the powers of the President of the Commission should be greatly increased. The President is to select one voting member of the Commission from lists of three nominees put forward by the States entitled to nominate voting Commissioners. The President would also appoint non-voting Commissioners from the other Member States. The President would also have power to require a Commissioner to resign, apparently without giving any reason and without judicial review. (At present, the Treaty provides that a Commissioner may be removed from office for incapacity or misconduct).

Giving the Commission President the discretionary power to select Commissioners from lists of three put forward by the States whose turn it is to nominate voting Commissioners will tend to improve the quality of Commissioners. Nevertheless, since only one State will have nominated each Commissioner ultimately chosen, this does nothing to make Commissioners more independent of the States which nominated them. But it will

lessen the solidarity of the Commission and end the present equality between the President and the other Commissioners.

The combined effect of the Parliament's power to approve (not really to choose)²⁶ the President and the President's power to choose and dismiss Commissioners (and because the President "shall be responsible to the European Parliament for the activities of the Commissioners") is that the Parliament would have much greater power over individual Commissioners, and over the Commission as a whole, than it has at present. For example, if a majority of members of the Parliament believed that the Competition Commissioner is too strict on State aid, even though State aid decisions are taken by the voting Commissioners collectively, Parliament could tell the President to dismiss the Commissioner in question. The President would have the power, and perhaps the political duty, to dismiss him, although to do so would be contrary to the principle of Commission solidarity.

So, quite apart from the question²⁷ of whether the Convention proposal gives the President, as an individual, too much power, the proposal interferes with the independence and solidarity of the Commission as a whole, even in connection with its decision-making powers, and with the independence of individual voting Commissioners.

It is impossible to know how future Presidents would use their powers to select Commissioners from Member States' lists, or to know how States will use their duty to propose three names. It is important, however, to understand that the President's power conceals, but does not resolve, the impossibility of having fifteen voting Commissioners who genuinely "reflect" a Union of twenty-five or more States, and it does nothing to restore the Commission's status as an impartial mediator. There is a basic contradiction between the approval of the Commission President by the Parliament, to increase the "legitimacy" of the Commission, and simultaneously making the Commission "representative," in any real sense, of only half of the Member States at a time.

26. See Draft Treaty, *supra* note 1, art. I-26, O.J. C 169/1, at 14 (2003) (merely allowing the Parliament to approve or reject a candidate proposed by the Council).

27. DEHOUSSE ET AL., *NOTRE EUROPE RESEARCH AND EUROPEAN ISSUES, THE INSTITUTIONAL ARCHITECTURE OF THE EUROPEAN UNION: A THIRD FRANCO-GERMAN WAY?* (2003).

VII. *THE REASONS FOR THE CONTROVERSY ABOUT
THE COMMISSION*

There seem to have been essentially two reasons for the controversy about the Commission, apart from a simple wish to reduce the power of any institution independent of governments. The first reason is that although many people paid lip service to the Community method, not all of them were very clear about its rationale or about the kind of Commission needed to carry it out. Some Members of the European Parliament in particular saw no reason why the Commission should be independent of the Parliament, and even said that it should accept specific instructions from the Parliament "like any government." Such comments could only be made by people who did not understand why the Commission, to fulfil its role, must be independent of majorities in the Council and the Parliament. The Parliament, of course, is seeking to extend its powers in any direction which may become available, but such comments suggest that the speakers had failed to understand that the EU institutions should *not* be thought of as if they were the institutions of a State, or even a confederation.

This misunderstanding or ignorance was largely due to the fact that the rationale of the Community method, and in particular for the nature and role of the Commission, had not been sufficiently explained, either when the EC Treaty was written in 1957 or since, to have become generally understood and accepted. If asked, many people would merely say that the Commission's role was to conceive and design policies in the interests of the Union as a whole, taking a broader view than any government could be expected or relied on to take. This is, of course, true and important, but it fails to take account of the mediator role of the Commission in protecting minority interests, which is more familiar in mediation theory than in political science.

The second basic reason why the current controversy over the composition of the Commission is that the members of the present Commission have shown surprisingly little collective understanding of the importance and the nature of the institutional questions presented in recent years. They had not agreed on a clear understanding about what kind of Commission was

necessary, and why.²⁸ Before Nice, they adopted a document saying that the Commission should be composed of less than one Commissioner per Member State, apparently without considering the significance of this suggestion for smaller Member States, or for the Commission's role as mediator. The reason given (that only in a smaller Commission could all Commissioners be sure to obtain portfolios of similar importance) was insufficient to justify such a radical and unsatisfactory conclusion, and suggests that the Commissioners understood their personal rivalries better than they understood the role of their institution, in particular for the protection of smaller States. As a result of the Commission's uncertainty about its own *raison d'être*, the Commission failed to provide intellectual leadership on institutional issues in the Convention, and the initiative passed into the hands of those who either did not understand its *raison d'être* or did not wish to act on it or strengthen it. In any event, it was not until after the Convention had ended that Romano Prodi announced, apparently for the first time, that there should be one Commissioner nominated by each Member State. Mr. Prodi and Mr. Michel Barnier said this again in August 2003, and said that it was the view of a majority of the Commission.²⁹

In September 2003, the Commission belatedly adopted a paper on, among other things, the question of its composition.³⁰ The paper says that non-voting Commissioners would destroy

28. See TEMPLE LANG, *EUROPAEUM*, *supra* note 11, at 14-15, 26-27; John Temple Lang & Eamonn Gallagher, *What Sort of European Commission does the European Union Need?* 1 *EUROPARÄTTSLIG TIDSKRIFT* 81, 85-86 (2002). See also Commission Communication: A Project for the European Union, May 22, 2002, COM (02) 247 final (referring to the Community method as having "to be adapted to the new requirements," but does not say what the method is, why it is important, or how it needs to be adapted). Even more surprisingly, it envisages qualified majority voting on CFSP measures without saying that they must be based on Commission proposals in accordance with the Community method. *Id.* at 4.

29. At the end of August 2003 the Finnish Government submitted a report to the Finnish Parliament in which it insisted on the need for a voting commissioner from each Member State at all times. See *STATSRÅDETS REDOGÖRELSE TILL RIKSDAGEN OM KONVENTETS RESULTAT OCH FÖRBEREDELSENA INFÖR REGERINGSKONFERENSEN* (August 2003).

30. See Commission Communication: A Constitution for the Union: Opinion of the Commission, pursuant to Article 48 of the Treaty on European Union, on the Conference of representatives of the Member States' governments convened to revise the Treaties, Sept. 17, 2003, COM (03) 548 final [hereinafter *A Constitution for the Union*] (setting out, in Annexes 2 and 3, proposals for the composition and organization of the Commission).

the collegial or collective nature of the institution, and lead to a loss of its legitimacy. The Commission should include a Commissioner from each Member State with the same rights and obligations. Some decisions should be delegated, and Commissioners would all decide only issues of strategic and political importance. This view rejects both the Convention and the Treaty of Nice formulas. The Commission's Opinion says that the Convention formula is "complicated, muddled and inoperable."

Since the Commission itself was not clear, it is perhaps understandable that the politicians in Nice allowed themselves to be bullied (apparently the word is not too strong) into accepting an unspecified reduction in the size of the Commission. Some of them apparently believed, quite unjustifiably, that the result would be a Commission of only one or two Members less than the number of States, a result which was never a serious possibility. *After* Nice, politicians who understood that a serious mistake had been made (both from the viewpoint of the Commission itself and from that of the smaller Member States) encountered difficulty in that they were seeking to re-open an agreement reached in Nice. As a result, politicians who went to Nice saying they would insist on keeping the right to nominate a Commissioner at all times have since been saying, unconvincingly, that having a non-voting "Commissioner" is satisfactory.

The confusion in the Commission's understanding of its own role was also shown by the suggestion, made initially by the Commission itself but supported by France, that the Commission should be responsible to both the Council and the Parliament. That suggestion failed to understand that the independence of the Commission from both the other institutions is essential to its mediator role, and is based on the fact that it is appointed by one body (essentially the Council) but removable by another (the Parliament). The suggestion was open to another obvious objection: what would happen if the Council wished to remove the Commission and the Parliament wanted to keep it, or vice versa?

VIII. THE INTERESTS OF LARGE MEMBER STATES IN
ENSURING THAT THE EUROPEAN UNION REMAINS
ACCEPTABLE TO THE SMALLER
MEMBER STATES

Even if the large Member States believe, as they apparently do, that their interests do not require a Commission where they would have a voting nominee at all times, they should be concerned about the Convention proposal. The EU is a voluntary association, and a voluntary association can last only if it remains acceptable to all its Member States. It has already been explained that a satisfactory mediator institution is necessary to make majority voting acceptable to Member States which are outvoted. If all the Member States were unsatisfied with the Commission as a mediator, they would be less willing to accept majority voting, without which the EU cannot function. Both small and large States have interests rather than affections, and the EU must cater to those interests. Under the Convention proposals, almost forty percent of the population of the EU can be outvoted. Such a large number of people will accept being outvoted only if they are satisfied that the institutional structure provides them with adequate safeguards.

In a very diverse association, majority voting is acceptable in the long run only with safeguards. *The only institutional safeguard is the Commission.* That is why, in the long term, it is crucial for the Community method and for the continued acceptance of the EU in the smaller Member States, that the Commission be always clearly and obviously fully representative of all Member States, as well as fully independent from them. This result can never be achieved with a Commission where only fifteen Commissioners have votes at any one time. The biggest problem facing the Convention is the great difference in sizes of various Member States. The size of the Council and Parliament must be based on the size of the Member States' populations. Thus, the Commission is the only institution which can safeguard the interests of a small State which happens to be in a minority on a particular issue.

The large Member States are adequately represented in the Council and Parliament and do not need the Commission as much as small States. The large States would be wise to realize that the Convention proposal goes *too far* to reduce the influ-

ence of, and the safeguards for, the small States. This would be true, in the long term, even if the large States had been more tactful in the introduction of the changes in the Convention. Even great tact and diplomacy could not have concealed the unsatisfactory nature of a Commission on which two-fifths or more of the Member States (the same proportion that can be outvoted in the Council) had no voting nominees for five years at a time. Treating large and small States equally on paper is no solution to this problem.

IX. *A FULL-TIME, LONG-TERM PRESIDENT OF THE COUNCIL*

Several large Member States maintain that the present six-month Presidencies, even with the help of the last and next Presidents in a "troika," make continuity impossible. Most smaller States strongly oppose this view.

It is now suggested that a long-term, full-time President³¹ should preside at Councils, give added weight to the external representation of the EU, and inform the Parliament about the Council's work. It is not suggested that he would be subject to any democratic control, and it is not clear to whom he would be accountable.

This would work only if there already were a consensus about clearer European policies — it would not do much to bring them about. Clearer European policies can best be brought about, if at all, by using the Commission to devise compromises. Yet the large States which are proposing a Council President are doing so because they do *not* want to strengthen the Commission.

A Council President not armed with any agreed European policy could hardly remain silent, but would certainly say what the large States wanted. In practice, such a President would be accountable only to them. In the absence of clear rules, the large States will have disproportionate influence, which will be exercised informally, in private.

A full-time long-term Council President would be outside the framework of the existing institutions (because he would not be a regular member of the Council), whether he would have his

31. See Draft Treaty, *supra* note 1, art. I-21(2), O.J. C 169/1, at 12 (2003). See also A Constitution for the Union, *supra* note 30, at para. 14.

own staff, and whether his role would be clearly separated from that of the Commission.

The main arguments against a long-term, full-time President of the Council are:

1. There is *no* substantial proposal for democratic control over the Council President, or for his election by democratic process.
2. The President of the Council would inevitably interfere with the "Foreign Minister," and probably also with the President of the Commission.
3. If the Council President's position was full-time, he would inevitably duplicate the work of the Commission President, or conflict with it. There would be two EU Presidents, and institutionalised rivalry between them.
4. Assurances of equality between large and small States in the choice of an effective President of the Council are naive and unrealistic.
5. The composition of the Council changes when governments change, and a President acceptable to all or most governments initially might cease to be acceptable after several years.

It is difficult to disagree with the comment that the initial version of this proposal was part of a "hostile take-over bid by supporters of an intergovernmental union,"³² a proposal "with objectives that are either undesirable or at present unattainable,"³³ and "the apotheosis of . . . intergovernmentalism . . ."³⁴ The final Convention formula is an imprecise and diluted version of the initial proposal.

X. A "EUROPEAN FOREIGN MINISTER?"

The Convention proposes that a "European Minister for Foreign Affairs"³⁵ should replace the present High Representa-

32. JOHN TEMPLE LANG, THE FEDERAL TRUST FOR EDUCATION AND RESEARCH, THE CONVENTION ON THE FUTURE OF EUROPE — SO FAR 5 (2003) (quoting Graham Watson, MEP).

33. *Id.* (quoting Christopher Patten)

34. Peter Sutherland, *Groupeement d'études et de recherches: Notre Europe*, Extract from the Address of Peter D Sutherland, President of the European Policy Centre Advisory Council at its Annual Meeting, at <http://www.notre-europe.asso.fr/pages/Contrib2-en.htm> (Oct. 11, 2002).

35. Draft Treaty, *supra* note 1, art. I-27, O.J. C 169/1, at 14 (2003).

tive and the Commissioner for External Relations. He or she would be both a member — in some sense — of the Commission and an officer of the Council. It is suggested, in effect, that he would be responsible to the Commission on some issues, but responsible to the Council on others. There is no suggestion that he or she would be democratically accountable to the Parliament.

Since Commissioners are required to be independent, and are required to act collegially, such a dual role would not be fully compatible with the concept of the Commission. To ensure their independence, Commissioners are appointed by the Council and removed by the Parliament and they cannot be responsible to or removable by another institution.

There are a few reasons for having a “Foreign Minister.” One reason is to provide a spokesperson for the EU on foreign policy matters. This is a desirable role, but there is no guidance on who is best suited to it. If he or she were a Member of the Commission and had no other office, no difficulty would arise.

But another reason for having a “Foreign Minister” is tacitly to take external relations issues away from the Commission and to transfer them to the Council; in other words, Mr. Patten’s successor would be downgraded and Mr. Solana’s successor and the Council’s influence both would be upgraded. This would be a political, and probably also a legal, change. This obvious result of the proposal to have a Foreign Minister represents real change. A Treaty provision to this effect would reduce the exclusive competence of the EU in “commercial policy” matters, and deprive small States of the protection given by the Community method and the requirement of a balanced Commission proposal. If the three pillars were entirely abolished (which the Convention text does *not* really do), it would mean applying the Community method, including the Commission’s exclusive power to propose measures, to CFSP and justice and home affairs. But the Commission is not being given the power to propose CFSP measures. Introducing the post of the “Foreign Minister,” as a quasi-officer of the Council, reduces the Commission’s role.

In other words, the Foreign Minister idea is another effort to reduce the influence of the Commission, and another part of the contest between intergovernmentalism and the three large

States, and the Community method, which safeguards the small States. The crucial issue is who the Foreign Minister would take orders from and who would appoint and dismiss him or her. Insofar as the Council instructed him or her, the Council would decide CFSP, with no need for a Commission proposal. If the Foreign Minister were only a member of the Commission, the Commission, acting collegially, would give him or her initial instructions and the Minister would follow the Council's decisions when the Council adopted, with or without modifications, the Commission's proposals.

If the Council's instructions conflicted with the proposals or policy of the Commission, the Minister would be in an impossible position if he or she were a member of the Commission. If the Minister were not a member of the Commission, but simply the servant of the Council, he or she would simply follow Council instructions. The Commission would be sidelined. It would not be possible for anyone who was both a Commissioner and an officer of the Council, to reconcile these two duties unless the views of the two institutions coincided.

Having a Foreign Minister who was part of both institutions would cause Commission-controlled money to become subject to the Council instead. It has already been suggested that Commission offices outside the EU should be put under the control of the Council.

Any arrangement, by which the Foreign Minister belongs to two institutions simultaneously, must necessarily be a compromise difficult in practice and confusing in theory. The present structure, with one or more Commissioners for foreign economic policy and one High Representative for non-economic foreign relations, is actually better than one "Foreign Minister" would be, because the responsibilities of each and their source of instructions is clear. The only objection is that the lines of demarcation inevitably are unclear or overlap, and there is an apparent duplication of functions. The Foreign Minister would have a different kind of difficulty. The Foreign Minister concept shows that it is not satisfactory to try to combine the Community method and the intergovernmental method.

This is, once again, the result of forgetting that the *raison d'être* of the Commission is *not* to be a kind of inflated civil service, but a separate institution, with a separate, limited, but nev-

ertheless valuable, policy-proposing role and responsibility, which requires its members to be independent from the European Parliament and the Council.

XI. COMMON FOREIGN AND SECURITY POLICY

The Convention proposal says that the "Union Minister for Foreign Affairs, for the field of common foreign and security policy, and the Commission, for other fields of external action, may submit joint proposals to the Council."³⁶ It also provides that the Minister for Foreign Affairs shall consult the Parliament, shall ensure that its views are duly taken into consideration, and shall keep it regularly informed.³⁷ These are almost the only references to either the Commission or the Parliament in the provisions on common foreign and security policy. These clauses have several serious implications.

First, the Commission is essentially excluded from common foreign and security policy. It is not merely that the Commission does not have the exclusive right to propose measures, as it has in the economic sphere under the Community method. It has no right to propose foreign and security measures at all. The safeguards which the Community method provides are excluded and there are no "checks and balances."

It may be said that the Commission is getting the power to veto a proposal of the Minister in the sphere of foreign and security policy. This is substantially incorrect, because the Council in this sphere does not act on Commission proposals, and the Council may give the Minister whatever instructions it wishes. Essentially, therefore, the Minister and the Commission each have its own sphere and are not equals.

The second consequence is that there is no democratic control over the foreign and security policy. The Parliament cannot provide this control because it does not appoint or remove the Minister or the Council. National parliaments also cannot provide this control. At most, they could censure or remove their own government representative. Furthermore, there is no judicial control.

36. Draft Treaty, *supra* note 1, art. III-194(2), O.J. C 169/1, at 66 (2003).

37. *See id.* art. III-205(2), O.J. C 169/1, at 68 (2003). The Parliament may ask questions of the Council and the Minister, or make recommendations to them, and shall debate the common foreign and security policy. *Id.*

A foreign and security policy developed intergovernmentally without the safeguards of either democratic control or the Community method is inconsistent with the claim that the Convention text has made the Union, overall, more democratic. The clauses also imply that the Union is not intended ever to move to the Community method in foreign and security policy. If that was intended, the Commission should have been given a non-exclusive right to propose measures for that policy.

These are serious objections to what is proposed. But it may also be useful to consider how the common foreign and security policy will work formally, on the basis of unanimity and without the help of a mediator institution.

If any Member State or group of Member States is free to propose any foreign policy measure, it is likely that measures will be proposed which are unbalanced or which do not adequately reflect the views or the interests of other Member States. Even if unanimity is needed, it may be obtained by bullying or bribery, or by the "linkage" of concessions on unrelated issues. None of these techniques is likely to lead to policies which are well thought out in the interests of the whole Union, or which are widely accepted and approved. Since several proposals may be put forward on any given subject — none of them designed in the interests of the whole Union and none of them designed by an impartial mediator — time will be spent in trying to reconcile rival texts. This will not lead to either clarity or efficiency. Blocs are likely to form, and minimal measures will be put forward by States reluctant to see any action taken. Council negotiations would be more of a tug-of-war between competing national interests than they are at present. Small Member States are unlikely to have their views accepted by large States unless they can be shown to be well thought out and objectively sound, and the most effective way of proving that would be to have them adopted by an impartial body such as the Commission.

It is true, of course, that a small and unrepresentative Commission would be less able to fulfil the mediator role in foreign policy than a fully representative Commission. But that is also true of economic policy, and is an argument for having a representative Commission, not an argument for doing without the safeguard of a mediator. Still less is it an argument for having no democratic control.

It is also true that the Commission has never had the exclusive right to propose foreign policy measures. But it had a non-exclusive right to do so, and the limits on its powers mattered less when common foreign policy was an aspiration and not a reality. As foreign policy becomes a reality, the institutional defects in its formulation will become more serious.

The absence of democratic control and of safeguards for minority interests is particularly worrying in light of the frequently expressed wish that the Convention draft should be adopted and should not be amended for many years. Such an unsatisfactory text might be acceptable as a step towards a better solution in a not-too-distant future. But it is not acceptable as a permanent regime.

The third consequence of the relevant provision — Article III-189³⁸ — is also serious. It means that the Commission may make a proposal for a commercial policy measure only with the agreement of the Minister. This is a retrograde step, because it means that the Council cannot even consider a Commission proposal unless it is approved by one individual who is not even a normal member of the Commission. This takes the commercial policy of the EU out of the Community method and makes it essentially intergovernmental.

This is not, unfortunately, a mere technicality. It is easy to visualize that the Commission might want to propose a trade-liberalizing measure in a new WTO round of negotiations, and that the Council might instruct the Minister to prevent it being formally proposed because some of the large Member States do not want the Commission's proposal to lead to changes in the Common Agricultural Policy, or do not want to benefit some other countries in the world. If this happened, the Commission's proposal would not become formally known and discussed and, because it was a commercial policy issue, no Member State could take it over and propose it for consideration.

In short, the common foreign and security policy proposals are the worst of all worlds — no Community method, no democratic or judicial control, and no suggestion that any will be introduced in the future.

38. *See id.* art. III-194(1), O.J. C 169/1, at 66 (2003).

XII. GENERAL COMMENTS

- The division between the large Member States and the smaller ones has become a central issue. This is similar to the division between intergovernmentalists and Community method supporters. It is *underlying* the difficulty over the President of the Council (if CFSP were based on Community method, this would be less problematic). It underlies the difficulty over the number of Commissioners, since States without voting Commissioners will *not* be equal. By contrast, the election of the Commission President and the status of the "Foreign Minister," are more technical and less controversial issues.

- If CFSP ended up largely in the hands of the large Member States, small States presumably would be able to opt out, and the large States already have the power to act without EU auspices.

- The Council President and the Foreign Minister issues involve variations on intergovernmentalism, which in any case will be the method used for foreign policy for the immediate future. But the issue of the size of the Commission, and to a lesser extent, the issue of the election and powers of the Commission President, are crucial because they affect the soundness and acceptability of the Community method.

- If unanimity is required for important decisions on common foreign and security policy, it is now clear that on at least some important issues, there may not be agreement between France and Germany on one side, and the United Kingdom on the other.

If, however, unanimity is *not* required, and qualified majority voting is possible, there is at least some possibility that France could be outvoted. Even today, France, Germany, Belgium, and Luxembourg would all have to vote together to veto a decision requiring a qualified majority. In the future, three large States (or some other combination) will be needed to exercise a veto. It is unclear, at present, that France would accept a foreign policy regime in which it might be outvoted. It is clear, however, that France wishes to have arrangements under which it and other like-minded States could act together without the consent of the other Member States.

- It is now clear how a foreign policy primarily influenced by France would look. It is important to understand what lies behind the increasingly assertive attitude of France. This is

France's last and best chance to build a European foreign policy construction in which it can expect to predominate, and which would be independent of the United States. (U.S. policy on Iraq and other issues has made many European governments *less* willing to follow U.S. leadership on foreign policy issues). This is why recent French statements and tactics have been designed to oblige European States to take sides between France and the United States, and to create structures, within the EU or in parallel, which would be intergovernmental in nature and limited to like-minded States. This is why Mr. Giscard d'Estaing and President Chirac provoked a conflict between the large Member States and the small ones, which had not arisen before, and which has not been resolved by the Convention. In effect, the French have tried to say to the new Member States "come into the European Union on French terms. Do not agree with the United States too strongly if France disagrees with it. If you do not want to enter on those terms, do not enter."

XIII. *REFERENDA*

Referenda to approve the new Constitutional Treaty are desirable in as many Member States as possible for several reasons:

- It will be important to establish that the final version of the new Treaty was accepted by the peoples of the EU, and not merely by their governments and parliaments.
- Knowing that the final version of the Treaty must be put to referenda will lead all the politicians discussing it to make it as clear, intelligible, and as acceptable everywhere as possible, and to make sure that it is explained and understood.
- Referenda will create a feeling of European solidarity which no other procedure could create.
- Referenda should put an end to campaigns to take certain States out of the EU, if those States held referenda.

It may be that France, which has never been enthusiastic about enlargement, would not regret it if some small States refused to accept the new Constitutional Treaty, for whatever reason.

XIV. *WHAT SHOULD BE THE POLICY OF A SMALL STATE?*

A small State's policy objectives should be:

- To protect the rights and powers of the small Member States, and to minimise intergovernmentalism in any form.
- To minimize or cure the present divisions on foreign policy attitudes and defence structures in Europe.
- To try to ensure, even if the Constitutional Treaty that emerges from the Convention and the IGC is imperfect, temporary or in need of further change, that it represents a satisfactory foundation for the future, and not one that will lead to a less satisfactory structure.
- Ireland should have an additional objective: to minimize any divergence of policies between the UK and the other Member States. The outburst of biased and ill-informed criticism of the Convention in the British media in May-June 2003 shows how opposed the English media are to any improvement or consolidation of the EU, and Ireland needs close cooperation from the UK to deal with the Irish Republican Army and the conflict in Northern Ireland.

In fact, the policy of all small States ought to be to reverse the mistake made in the Nice Treaty and the Convention and to insist that the Commission always include one voting nominee of each Member State. The Nice Treaty is just as open to reconsideration and renegotiation as all the other Treaties.

Small States' policy should be to strengthen the Commission. All small States need the Commission. A prejudice against the Commission, however, has developed in Ireland and elsewhere in recent years. This seems to be because the Commission has insisted on States carrying out their obligations under EU law. This prejudice is irrational and self-destructive. For small States, the Commission's law-enforcement role is at least as important as, if not more important than, its policy-proposing role under the Community method. It ought to be clear that the Commission must enforce the law equally against all Member States. It also ought to be clear — but apparently it is not — that smaller States have much more to gain than to lose from the Commission enforcing, for example, EU rules on State aid. If Member States indulge in unrestrained competition to subsidize their domestic industries, France and Germany can afford to pay larger subsidies for longer than small States. It is therefore clearly in small States' interests to strengthen the Commission, and not to allow pique or irritation to weaken policy in this respect. Small States would *not* be better off, in a Union of twenty-five or thirty States, with a weak Commission. Small States also

need the Commission to apply the rules on State aid strictly in the ten new Member States. Small States cannot have a Commission that is firm with all the other Member States and lax when dealing with them. The interests of small States call for a Commission that is respected by other Member States, and whose policy proposals will be taken seriously and whose decisions will be respected and carried out.

This calls for a clear-sighted recognition that the small States made a mistake in Nice when they allowed themselves to be pressured into agreeing to reduce the size of the Commission. Nominal equality, such as in rotating Commissioners is dangerously self-deceptive: a small State without a voting Commissioner is never in the same position as a large State without a voting Commissioner.

In an enlarged Union of twenty-five or more States, a small State will have less influence, be less able to obtain special treatment, and agreements will be harder to reach, even by qualified majority. Therefore, sound and well-balanced Commission proposals, designed to be as generally acceptable as possible, are essential. This necessitates a Commission composed of one nominee from each State.

There is another reason why prejudice against the Commission has arisen: many people in Ireland read English newspapers, and most English newspapers are opposed, strongly or moderately, to the EU in general and the Commission in particular. Swedish prejudices against the EU are similarly accentuated by reading Danish newspapers. Irish interests in Europe are very different from those of the United Kingdom, and Ireland and Sweden should formulate their own policies without being influenced by English or Danish prejudices.³⁹

Prejudices are dangerous as is the fear of thinking clearly and frankly about unexamined and outdated assumptions. Neutrality, in Sweden and Ireland, is one such assumption. What contemporary reasons are there for it? What sacrifices should be made for it? Moreover, to what degree does it give a right to have other countries defend our interests without any contribution? These questions need to be analyzed honestly and frankly.

Clear thinking is particularly necessary because the reasons why the existing EU institutions were designed are *not* well-

39. Scots, by comparison, are much less anti-European.

known or understood. The discussions in the Convention have been seriously handicapped by the lack of any European equivalent of the "Federalist Papers" in which Madison, Hamilton, and Jay explained the U.S. Constitution to the inhabitants of New York and to the American people.

In the IGC, there will be important negotiations on institutional questions. The result is likely to be a compromise. In such negotiations, each State must have priorities and a negotiation strategy. There are several basic principles:

- Never give away a lasting across-the-board concession (e.g., agreeing to reduce the size of the Commission) to obtain a narrow concession that is likely to be temporary.
- Never give away a concession of undoubted value (e.g., the size of the Commission) in exchange for a concession that may prove to be of little value, or even damaging.
- Never make a concession that affects the interests of the State as a whole, merely to satisfy the views or interests of one particular lobby. Sacrificing the right to nominate a voting Commissioner, in order to keep a veto on other EU measures, was contrary to these three principles.
- Always look into the future as far as possible, and seek the concessions with the greatest lasting value. This is being done by at least two large States.
- Never be unnecessarily obstructive. Supposedly neutral countries cannot both refuse to take part in foreign policy measures and prevent other Member States from adopting them. A State should not object to effective common measures to combat terrorism or organised crime merely because they would involve changes in criminal law.
- Know your priorities. Ministers went to Nice saying they were determined to keep the right to nominate a Commissioner; they came back having given it away.
- Try to ensure that all Member States obtain a new Constitutional Treaty which will be approved in referenda and which all States can and will ratify. A State which does not ratify the new Treaty will find it extremely hard to influence the development of the EU, even if it ratifies later.

It may be argued that small States should not try to get back the right to nominate a voting Commissioner at all times, because that would lead the large States to reopen the voting rights agreed on in Nice. But the large States are already trying in various ways to get more power in the Council and the Parliament

than was agreed on in Nice. The importance of the Commission for small States is crucial and too important to be left to purely tactical considerations. Only the Community method can prevent the hegemony of the large States.

CONCLUSION

It is clear that after the next IGC, the EU will deal with economic and social matters by the Community method and with foreign policy by an intergovernmental method. The overriding aim of all the small countries should be to ensure that the Community method is not devalued by the reduction in the number of voting members of the Commission. It is more important to maintain the size of the Commission than to have Parliament elect the President of the Commission. For the small Member States in particular, maintaining the size of the Commission, with one voting nominee from each State, is even more important than the question of the Foreign Minister (and even to a Council President with limited functions), because foreign policy will, in any case, be intergovernmental. Small countries must look ahead to the time when the EU will decide to have one method for both economic and foreign policy, because then it will be crucial for small States that the method chosen be the Community method.

At this stage, it is impossible to reach a final evaluation of the work of the Convention. Whether it will ultimately be judged a success will depend on the next IGC rather than on the Convention itself. Nevertheless, several comments can be made.

First, the concept of a Convention to discuss and draft what rapidly came to be seen as a whole new constitution was undoubtedly a success. The atmosphere and attitudes within the Convention came to be very different from the petty diplomatic bargaining of previous IGCs, and from the deplorable confusion and profoundly unsatisfactory result of Nice. For the first time since 1956, and for the first time explicitly, Europeans set out to draft a constitution for Europe. This success is shown by the relative ease with which agreement was reached on the series of apparently technical provisions about constitutional issues that were summarized in this Article. But it was more fundamental than that: the participants in the Convention knew that they

were designing and writing a wholly new kind of constitution, not merely revising a group of existing Treaties.

Second, whether the new Constitution becomes a lasting success or another less than satisfactory stage in the development of the EU depends crucially on how the major issues, left unresolved by the Convention, are ultimately dealt with by future IGCs. This, in turn, will depend on whether the small Member States understand clearly what is at stake and are determined to insist on a sound result. This remains to be seen: the small States gave in weakly in Nice, and they may do so again. So far, the result of the Convention is, in crucial respects, a political and intellectual muddle.

The major issues explained in this Article all concern the choice between the Community method and the intergovernmental approach. The result of the next IGC will not be the clear-cut adoption of either, but a mixture of the two. One solution would be for a vote in the Council to require a majority of States and of the population, and in return for every State to have a right to nominate a voting Commissioner at all times. The President of the Commission will presumably be elected or approved by the European Parliament (a Community method result), but with a Council President chosen intergovernmentally by Heads of State. How such a mixture would work cannot be foretold at this stage: much would depend on the practice concerning the Council President, since the rules are not clear.

A third, and more important, long-term conclusion can already be suggested. It has been taken for granted in the Convention that the Community method, in the only meaningful sense of the Commission's exclusive right to propose new policies and measures, was not going to be applied to common foreign and security policy. This means that the EU will continue to have two entirely different sets of procedures for foreign and security policy and for economic matters, the first essentially intergovernmental, the second based on the Community method. The EU would be "multipolar" both in the sense of having two methods of taking decisions and also in the sense of having two Presidents of two distinct EU institutions, plus a Foreign Minister. This multiplication is irrational and unfortunate because it has not been clearly understood and stated that the Community method and the Commission's exclusive right to propose EU measures are essential to majority voting.

Until the Community method is applied to common foreign and security policy, the EU, unlike any other organization, will have two distinct sets of institutions and procedures, one for foreign policy, the other for economic and social policy. That is not a rational structure, and one hopes that it will be a temporary one.

Fourth, the Convention proposals present a fundamental defect: two new offices are proposed and a strengthened foreign policy envisaged, yet nothing is done to ensure democratic or judicial control over any of them. The basic conception is still intergovernmental⁴⁰ and is neither democratic nor compatible with the Community method. One of the difficulties is that some governments which might be expected to be in favor of democratic control do not want to have it provided by the European Parliament.

For the reasons given above, the intergovernmental method is self-defeating, and will create solutions which will be neither satisfactory nor permanent. Europe will still be a work in progress after the next IGC. The Philadelphia Convention in 1786 had a much easier job and was more successful. But the achievement of peace in Europe is a greater achievement than obtaining victory in North America.

One of the reasons why the Philadelphia Convention was more successful was that all of the delegates agreed that they were trying to devise the best constitution for the then thirteen United States. They had no conflicting loyalties, although they disagreed about how much power should be centralized. By contrast, the difficulties which have arisen in Europe have largely been due to the fact that the French and British governments have been trying to obtain the solutions which would maximize their influence. Only when the most influential politicians in Europe put European interests first, as they did when the Community was set up, will truly satisfactory long-term solutions be reached.

The long-term implications of the Convention's results also are unsatisfactory. This Article has explained why a Commission which is reduced in size would be regarded as unsatisfactory.

40. See DEHOUSSE, *supra* note 27, at 28 (quoting Jacques Delors as stating "[t]he intergovernmental scenario is prevalent in the Franco-German paper and the federal scenario is not").

The distinction between economic and social affairs, subject to the Community method, and foreign and security affairs, subject to the intergovernmental method without effective democratic control, will increasingly be regarded as unsatisfactory, as indeed it is. Eventually, the conclusion will be reached that both economic and foreign policy should be dealt with under one method, and that a choice must be made. Because a Commission reduced in size would be regarded as unsatisfactory, the conclusion might be reached at that time that the Community method should be abandoned. When that time comes, it is extremely important that the Community method should be ready for use in foreign and security policy, and should not have been devalued. That is the real long-term danger of the reduction in the size of the Commission which was agreed on in Nice. The Convention has done nothing to reduce that danger, and has in fact increased it.

*"There are many things in the Commonwealth . . . which I rather wish than hope to see adopted in our own."*⁴¹

41. THOMAS MORE, *UTOPIA* (1516).